Takako Sakao (f) v Ng Pek Yuen (f) & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-20 OF 2009(W)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), ZULKEFLI AND GOPAL SRI RAM FCJJ
16 OCTOBER 2009

Evidence — Adverse inference — Failure of first respondent to give evidence refuting appellant's testimony — Whether appellant's evidence should be presumed to be true — Whether there was misdirection on part of lower courts to address this omission — Whether misdirection amounted to miscarriage of justice that warranted interference

Trusts and Trustees — Constructive trusts — Intention to create a trust — Pre-existing fiduciary relationship between appellant and first respondent — Arrangement to jointly own property — Whether constructive trust had arisen by operation of law — Whether appellant acquired any enforceable rights against respondents — Whether s 433B of the National Land Code applied to constructive trusts

Trusts and Trustees — Trustees — Characteristics of trustee — Whether constructive trustee had acted in breach of her fiduciary duties — Whether appellant acquired any enforceable rights against respondents

The appellant, a Japanese citizen and the first respondent were business partners in a restaurant. Sometime in September 1992, they decided to acquire the shop house ('the property') in which they operated their restaurant business. According to the appellant the property was to be purchased and registered in the joint names of herself and the first respondent in equal shares and she had provided RM194,610 as her contribution towards the purchase price. Instead, the first respondent had purchased the property for a sum of RM950,000 and registered it in her sole name. Thereafter, the first respondent had sold the property to the second respondent company for a sum of RM1,930,000. In the meantime the appellant had lodged a caveat to protect her interest in the property. The appellant also commenced the present action against the first respondent to establish that she was the beneficial owner of the property of which the second respondent was the registered proprietor. The appellant's claim that a trust had arisen in her favour was dismissed by the High Court, which

directed the appellant to remove the caveat she had entered and directed the first respondent to refund the sum of RM65,450, which was the sum the court found to be the appellant's contribution, with interest. The High Court also held that s 433B of the National Land Code ('the Code') barred the appellant from enforcing any trust that may have arisen in her favour by reason of her contribution towards the purchase price. When the appellant appealed to the Court of Appeal, the latter affirmed the High Court's orders. In this appeal this court had to consider the four main issues of whether the High Court's evaluation of the appellant's evidence in particular as to the amount of her contribution to the purchase price of the property was correct; whether the appellant acquired any rights under the terms of the mutual understanding between her and the first respondent; whether the appellant acquired any enforceable rights against the second respondent; and whether s 433B of the Code applied to the instant case.

Held, allowing the appeal:

(1) An important omission missed by both the lower courts was the fact that the first respondent never gave any evidence to refute the appellant's testimony. In fact, only the appellant testified on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. The first respondent was the only other person, other than the appellant, who was fully conversant with the facts but she refrained from giving evidence. Thus, the evidence given by the appellant ought to be presumed to be true. The trial judge ought to have accepted the appellant's evidence as true in the absence of any evidence from the first respondent going the other way and his failure to direct himself in this fashion occasioned a serious miscarriage of justice. Further, the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the terms of the mutual agreement that she had with the first respondent, in the absence of any evidence given by the first respondent. The trial judge's treatment of the first respondent's failure to give evidence as a matter of no apparent consequence showed that there was no judicial appreciation of the appellant's evidence (see paras 3–5 & 7).

(2) When there are concurrent findings of fact by both the courts below, it is the settled practice of this court not to interfere with those findings. However, since the present case was one in which both the courts below neglected to apply the true principle of law applicable to the fact pattern thereby occasioning a miscarriage of justice it warranted interference to correct the findings (see paras 8–11).

(3) The fact pattern of the appellant's case falls squarely within the parameters of a constructive trust. The cumulative circumstances such as the pre-existing fiduciary relationship and the arrangement to jointly own property in equal shares show an intention to create a trust from the outset. However, the first respondent acted in breach of her fiduciary duties when she acquired the property, had it registered in her sole name, sold the same to the second respondent at a higher price and denied the appellant her right to a half share in it. In such circumstances, the first respondent was guilty of equitable fraud in relation to the appellant's interest in the property. The appellant was therefore entitled to a half share in the trust property as a beneficiary under a constructive trust. She was also entitled to claim it from the first respondent and to trace her half share in the property into the hands of anyone who acquired it. Both courts below incorrectly assumed that this was a case of a resulting trust (see paras 13–14, 16–17 & 20–21).

(4) The trust in the appellant's favour may be enforced against the second respondent as the latter was not a bona fide purchaser for value. The second respondent company was in substance the alter ego of the first respondent's common law husband and as such the sale and transfer to the second respondent was a mere façade concealing the true facts. Thus the second respondent was accountable to the appellant for the trust property. Further, the doctrine of privity of contract had nothing to do with the fact pattern in the instant case because it is settled law that trusts are an exception to the common law rule of privity of contract. As such the appellant can enforce the trust against both the first and second respondents (see paras 22, 27 & 31–32).

(5) The trust referred to under s 433B(1)(c) of the Code is an express trust registered in accordance with s 344 of the Code and it does not include within its purview constructive trusts which arise by operation of law. Thus s 433B(1)(c) of the Code had no application to the constructive trust imposed upon the first respondent and the courts below erred in the way in which they interpreted the section without regard to the true nature of the trust in this case (see para 35).

[Bahasa Malaysia summary

Perayu, seorang warganegara Jepun dan responden pertama merupakan rakan kongsi sebuah restoran. Sekitar bulan September 1992, mereka bercadang untuk mendapatkan rumah kedai ('hartanah') di mana mereka menjalankan perniagaan restoran mereka. Menurut perayu harta tersebut akan dibeli dan didaftarkan atas nama bersama perayu dan responden pertama dalam bahagian sama rata dan dia telah memperuntukkan RM194,610 sebagai sumbangannya terhadap harga belian. Sebaliknya, responden pertama

membeli hartanah tersebut untuk jumlah RM950,000 dan mendaftarkannya atas namanya sahaja. Kemudiannya, responden pertama menjual harta tersebut kepada syarikat responden kedua untuk jumlah RM1,930,000. Dalam masa yang sama perayu memasukkan kaveat untuk melindungi kepentingannya dalam hartanah tersebut. Perayu juga memulakan tindakan ini terhadap responden pertama untuk membuktikan bahawa dia merupakan pemunya benefisial hartanah yang mana responden kedua merupakan tuan punya berdaftar. Tuntutan perayu bahawa satu amanah timbul bagi pihaknya ditolak oleh Mahkamah Tinggi, yang mana telah mengarahkan perayu untuk memotong kaveat yang dimasukkannya dan mengarahkan responden pertama memulangkan sejumlah RM65,450, jumlah yang didapati oleh pihak mahkamah sebagai sumbangan perayu, dengan faedah. Mahkamah Tinggi juga memutuskan bahawa s 433B Kanun Tanah Negara ('Kanun') menghalang perayu daripada menguatkuasakan apa-apa amanah yang timbul bagi pihaknya melalui alasan sumbangannya terhadap harga belian. Apabila perayu merayu ke Mahkamah Rayuan, Mahkamah Rayuan mengesahkan perintah Mahkamah Tinggi. Dalam rayuan ini mahkamah perlu mempertimbangkan empat isu utama iaitu sama ada penilaian Mahkamah Tinggi mengenai keterangan perayu khususnya berhubung dengan sumbangannya terhadap harga belian hartanah adalah tepat; sama ada perayu memperoleh apa-apa hak di bawah terma-terma persefahaman bersama di antara dia dan responden pertama; sama ada perayu memperoleh apa-apa hak yang boleh dikuatkuasakan terhadap responden kedua; dan sama ada s 433B Kanun terpakai dalam kes ini.

Diputuskan, membenarkan rayuan:

(1) Satu perkara penting yang tidak dimasukkan oleh kedua-dua mahkamah bawahan ialah fakta bahawa responden pertama tidak pernah memberi apa-apa keterangan untuk menyangkal testimoni perayu. Sebaliknya, hanya perayu yang memberi keterangan mengenai terma-terma persetujuan dan jumlah wang yang disediakannya dan tujuan wang tersebut disediakan. Responden pertama merupakan satu-satunya, selain perayu, orang yang mengetahui sepenuhnya fakta-fakta tetapi dia enggan memberi keterangan. Oleh itu, keterangan yang diberikan oleh perayu dianggap benar. Hakim perbicaraan sepatutnya menerima keterangan perayu sebagai benar dalam ketiadaan apa-apa keterangan daripada responden pertama dan kegagalannya untuk berbuat demikian menyebabkan salah laksana keadilan. Selanjutnya, mahkamah perlu membuat inferens bertentangan terhadap responden pertama terhadap jumlah caruman perayu kepada harga belian, begitu juga dengan perjanjian bersama dengan responden pertama, dalam ketiadaan apa-apa keterangan oleh responden pertama. Perlakuan hakim perbicaraan terhadap kegagalan responden pertama

untuk memberi keterangan sebagai perkara yang tidak memberi apa-apa kesan menunjukkan bahawa tidak terdapat penghayatankehakiman terhadap keterangan perayu (lihat perenggan 3–5 & 7).

(2) Apabila terdapat dapatan fakta selaras oleh kedua-dua mahkamah bawahan, adalah menjadi lumrah bahawa mahkamah ini tidak akan campur tangan dalam dapatan tersebut. Walau bagaimanapun, memandangkan kes ini adalah satu kes di mana kedua-dua mahkamah bawahan telah mengabaikan untuk menggunapakai prinsip undang-undang yang betul kepada pola fakta dan menyebabkan salah laksana keadilan, ini mewajarkan campur tangan untuk membetulkan dapatan tersebut (lihat perenggan 8–11).

(3) Pola fakta dalam kes perayu terangkum dalam parameter amanah konstruktif. Keadaan-keadaan kumulatif seperti hubungan fidusiari yang wujud dan persetujuan untuk memiliki hartanah secara bersama dalam bahagian yang sama rata menunjukkan niat untuk mewujudkan amanah sejak dari mula lagi. Walau bagaimanapun, responden pertama bertindak melanggar kewajipan fidusiarinya apabila dia mendapatkan harta tersebut, mendaftarkan atas namanya sahaja, menjual hartanah tersebut kepada responden kedua pada harga yang lebih tinggi dan menafikan sebahagian hak perayu di dalamnya. Dalam keadaan ini, responden pertama bersalah melakukan fraud ekuiti berhubung dengan kepentingan perayu dalam hartanah tersebut. Oleh itu perayu berhak atas bahagiannya dalam hartanah amanah tersebut sebagai benefisiari di bawah amanah konstruktif. Dia juga berhak untuk menuntutnya daripada responden pertama dan mengesan sebahagian sahamnya dalam harta yang berada di tangan sesiapa yang memperolehnya. Kedua mahkamah bawahan telah tersilap menganggap bahawa ini merupakan amanah berbangkit (lihat perenggan 13–14, 16–17 & 20–21).

(4) Amanah bagi pihak perayu boleh dikuatkuasakan terhadap responden kedua memandangkan responden kedua bukan pembeli bona fide dengan nilai. Syarikat responden kedua secara asasnya merupakan alter ego suami *common law* responden pertama dan oleh itu penjualan dan pemindahan kepada responden kedua hanya pada zahirnya untuk menyembunyikan fakta-fakta sebenar. Oleh itu responden kedua bertanggungan kepada perayu untuk hartanah amanah tersebut. Selanjutnya, doktrin priviti tidak bersangkut dengan pola fakta dalam kes ini kerana adalah nyata dalam undang-undang bahawa amanah merupakan pengecualian untuk prinsip *common law* kontrak priviti. Oleh itu perayu boleh menguatkuasakan amanah terhadap responden pertama dan kedua (lihat perenggan 22, 27 & 31–32).

(5) Amanah yang dirujuk di bawah s 433B(1)(c) Kanun merupakan amanah tersurat didaftar menurut s 344 Kanun dan ini tidak termasuk

dalam skop amanah konstruktif yang berbangkit melalui operasi undang-undang. Oleh itu s 433B(1)(c) Kanun tidak boleh digunapakai kepada amanah kontruktif yang dikenakan ke atas responden pertama dan mahkamah bawahan khilaf dalam cara bagaimana mereka mentafsirkan seksyen tersebut tanpa memberi perhatian terhadap sifat amanah dalam kes ini (lihat perenggan 35).]

Notes

For a case on characteristics of trustee, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) para 2528.

For cases on adverse inference generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 125–234.

For cases on constructive trusts generally, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2291–2293.

Cases referred to

Bell Group Ltd (In liquidation), The v Westpac Banking Corporation (No 9) [2008] WASC 239; 70 ACSR 1 (refd)

Berry v British Transport Commission [1961] 3 All ER 65, CA (refd)

Beswick v Beswick [1968] AC 58, HL (refd)

Blisset v Daniel (1853) 68 ER 1022 (refd)

Carl Zeiss Stiftung v Herbert Smith & Co [1969] 2 Ch 276, CA (refd)

Crawford v Financial Institutions Services Ltd (Jamaica) [2005] UKPC 40, PC (refd)

Diplock's Estate, Re [1948] 2 All ER 429, CA (refd)

'Eurymedon', The (1942) 73 Lloyd's LR 217, HL (folld)

Frame v Smith (1987) 42 DLR (4th) 81 (refd)

Gurbakhsh v Gurdial AIR 1927 PC 230 (refd)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (refd)

Heng Gek Kiau v Goh Koon Suan [2007] 6 CLJ 626, CA (refd)

Herrington v British Railways Board [1972] AC 877, HL (refd)

Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)

James Birtchnell v The Equity Trustees, Executors and Agency Co Ltd (1928–30) 42 CLR 384 (refd)

Jones v Lipman [1962] 1 All ER 442, CA (refd)

Kyriakides v Pippas [2004] EWHC 646, Ch (refd)

Onassis and Calogeropoulos v Vergottis [1968] 2 Lloyd's Rep 403, HL (folld)

Paragon Finance plc v DB Thakerar & Co [1999] 1 All ER 400, CA (refd)

Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)

Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy & Ors [1946] AC 508, PC (refd)

Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor [1996] 3 MLJ 533; [1997] 1 CLJ 529, FC (refd)

Suntoso Jacob v Kong Miao MingTakako Sakao v Ng Pek Yuan & Ors and another appeal [1986] 2 MLJ 170, CA (refd)
Takako Sakao v Ng Pek Yuan & Ors and another appeal [2009] 4 MLJ 66; [2009] 5 CLJ 200, CA (refd)
Wasakah Singh v Bachan Singh (1931) 1 MC 125 (refd)
Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669, HL (refd)
Wisniewski v Central Manchester Health Authority [1998] PIQR 324, CA (refd)
Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd [2002] 3 MLJ 143; [2002] 3 CLJ 409, CA (refd)
Woolfson v Strathclyde Regional Council 1978 SLT 159, HL (refd)

Legislation referred to

National Land Code ss 344, 433B, 433B(1), (1)(a), (c), 433C
Specific Relief Act 1950 s 26(b)

Appeal from: Civil Appeal No W-02–1236 of 2005 (Court of Appeal, Putrajaya)

Manjit Singh Saini (Harun Idris, Yeoh & Partners) for the appellant.
S Parameswary (K Gheethabai with him) (Tay, Tee & Nasir) for the second respondent.

Gopal Sri Ram FCJ (delivering judgment of the court):

[1] The appellant is a Japanese citizen. She brought an action to establish that she was the beneficial owner of a share in a shop-house of which the second respondent, a private limited company is the registered proprietor. She failed before the High Court. Her appeal to the Court of Appeal was dismissed. She now appeals to us pursuant to the leave granted by this court. The facts have been fully rehearsed by the Court of Appeal in its judgment that is reported in [2009] 4 MLJ 66; [2009] 5 CLJ 200. We are therefore spared the task of regurgitating them here. Suffice that we state the facts relevant to the issues in this appeal.

[2] The appellant and the first respondent were partners in the business of a restaurant. Sometime in 1992, they decided to acquire the building in which the restaurant had its business. Each of them was to contribute towards the purchase price. In the courts below, the appellant said that she had provided a sum of RM214,610 as her contribution towards the price. That figure was however corrected before us to RM194,610. But the courts below did not accept that this payment had been made. They found for the far lesser

sum of RM65,450. They also held that s 433B of the National Land Code ('the Code') barred the appellant from enforcing any trust that may have arisen in her favour by reason of her contribution towards the purchase price. We will address these matters later in this judgment. It is the appellant's case that there was an agreement or more appropriately, a mutual understanding, between her and the first respondent that the building, when acquired, was to be purchased and registered in the joint names of herself and the first respondent in equal shares. That did not happen. What however did happen was that the first respondent purchased the property in question on 6 March 1992, for a sum of RM950,000 and had it registered in her sole name. Part of the purchase price had been raised by way of a loan from Perdana Finance Bhd. In mid-1996 the first respondent sold the property to the second respondent company for a sum of RM1,930,000 part of which was raised by way of a loan from Malayan Banking Bhd. In the meantime, the appellant lodged a caveat to protect her interest in the property. She then instituted proceedings to enforce the trust she claimed had arisen in her favour. Proceedings were also commenced by the first respondent for the removal of the appellant's caveat. Both actions were tried together by the High Court which found against the appellant. It dismissed the appellant's action and directed the removal of her caveat. It also ordered the first respondent to refund the sum of RM65,450 with interest to the appellant. The appellant appealed to the Court of Appeal which affirmed the High Court's orders.

[3] Four main points arise in this appeal. First, whether the High Court's evaluation of the appellant's evidence was correct, in particular as to the amount of her contribution to the purchase price. Second, what rights, if any did the appellant acquire under the terms of the mutual understanding between her and the first respondent? Third, whether the appellant may enforce her rights, if any, against the second respondent. And fourth, whether s 433B of the Code applies to the instant case. Taking the first issue, it is significant that in the present instance the first respondent did not attend court nor give evidence nor take any part in the case. All she did was merely to put forward arguments on why the appellant's caveat ought to be removed. She could have, if she wished, given evidence and challenged the appellant's evidence. But as already noted she refrained from doing that. On the facts of this case, there were two persons who were privy to the terms of the arrangement in question and the details of the payments made and the purpose for which they were made: the appellant and the first respondent. The appellant took the witness stand and gave her evidence on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. No evidence was called on the part of the first respondent to refute the appellant's testimony. Such an important omission was missed by both courts below.

[4] In our judgment, two consequences inevitably followed when the first respondent who was fully conversant with the facts studiously refrained from giving evidence. In the first place, the evidence given by the appellant ought to have been presumed to be true. As Elphinstone CJ said in *Wasakah Singh v Bachan Singh* (1931) 1 MC 125 at p 128:

> If the party on whom the burden of proof lies gives or calls evidence which, if it is believed, is sufficient to prove his case, then the judge is bound to call upon the other party, and has no power to hold that the first party has failed to prove his case merely because the judge does not believe his evidence. At this stage, the truth or falsity of the evidence is immaterial. For the purpose of testing whether there is a case to answer, all the evidence given must be presumed to be true.

Now, what the trial judge did in the present case is precisely what he ought not to have done. He expressed dissatisfaction with the appellant's evidence without asking himself that most vital question: does the first defendant/respondent have a case to answer? This failure on the part of the trial judge is a serious non-direction amounting to a misdirection which occasioned a miscarriage of justice. The trial judge was at that stage not concerned with his belief of the appellant's evidence. She had given her explanation as to the discrepancies in the figures. And her evidence does not appear to be either inherently incredible or inherently improbable. In these circumstances it was the duty of the judge to have accepted her evidence as true in the absence of any evidence from the first respondent going the other way. He however failed to direct himself in this fashion thereby occasioning a serious miscarriage of justice.

[5] The second consequence is that the court ought to have drawn an adverse inference against the first respondent on the amount of the appellant's contribution to the purchase price as well as the existence and the terms of the mutual understanding or agreement that she had with the first respondent. Where, as here, the first respondent being a party to the action provides no reasons as to why she did not care to give evidence the court will normally draw an adverse inference. See *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33. See also *Jaafar bin Shaari & Anor (suing as Administrators of the Estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 where Peh Swee Chin FCJ said: 'The respondents had chosen to close the case at the end of the appellants' case. Although they were entitled to do so, they would be in peril of not having the evidence of their most important witness and of having an adverse inference drawn against them for failing to call such evidence should the circumstances demand it.' There are two other authorities that are of assistance on the point. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324, Brooke LJ when delivering the judgment of the Court of Appeal quoted from a number of authorities including the following passage from the speech of Lord Diplock in *Herrington v British Railways Board* [1972] AC 877:

> The appellants, who are a public corporation, elected to call no witnesses, thus depriving the court of any positive evidence as to whether the condition of the fence and the adjacent terrain had been noticed by any particular servant of theirs or as to what he or any other of their servants either thought or did about it. This is a legitimate tactical move under our adversarial system of litigation. But a defendant who adopts it cannot complain if the court draws from the facts which have been disclosed all reasonable inferences as to what are the facts which the defendant has chosen to withhold.

Brooke LJ then went on to say this:

> From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.

The other case is *Crawford v Financial Institutions Services Ltd (Jamaica)* [2005] UKPC 40, where Lord Walker of Gestingthorpe when delivering the advice of the Privy Council said:

> It is well settled that in civil proceedings the court may draw adverse inferences from a defendant's decision not to give or call evidence as to matters within the knowledge of himself or his employees.

Sarkar on Evidence (16th Ed) at p 1837 states:

> It is the bounden duty of a party personally knowing the whole circumstances to give evidence and to submit to cross-examination. Non-appearance as a witness would be the strongest possible circumstance to discredit the truth of his case *Gurbakhsh v Gurdial* AIR 1927 PC 230.

[6] In the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice. To conclude the first issue, it is our judgment that there was no judicial appreciation of the appellant's evidence. A reasonable tribunal correctly directing itself on the facts and the relevant law would have held that the appellant had indeed contributed RM194,610 towards the purchase price of the building; that there was a mutual understanding between the appellant and the first respondent that they shall be beneficial co owners of the property in question in equal shares; and that the first respondent had acted in breach of that understanding.

[7] Learned counsel for the second respondent argued that this being a case in which there are concurrent findings of fact by both courts below, we should not, in accordance with the settled practice of this court, interfere with those findings. The short answer to that submission is that the practice referred to applies to cases where the tribunal of fact at first instance as well as the Court of Appeal have not misdirected themselves. To meet the argument thus advanced, we refer to the speech of Viscount Simon in *The 'Eurymedon'* (1942) 73 Lloyd's LR 217:

> The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us to overthrowing what has already been decided. If it could be shown that the course of events affirmed by the learned judge could not have occurred, that would be an excellent reason for reversing his view — in these mundane happenings there is no more conclusive argument than *non est credendum quia* impossible. If the impeached decision were shown to be unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.

As has been amply demonstrated, the present case is one in which there was an unwarranted deduction based on faulty judicial reasoning from admitted and established facts. Hence this is an appropriate case to which the concurrent findings rule of practice does not apply.

[8] We also approve and apply to the facts of the present instance the observations of Lord Pearce in his dissenting speech in *Onassis and Calogeropoulos v Vergottis* [1968] 2 Lloyd's Rep 403 at p 430:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of a wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of the respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant in the end failed to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

In our judgment, the present instance is one in which so much of the judgment at first instance that is based on facts should not be allowed to stand because it has occasioned a substantial wrong or miscarriage of justice.

[9] The last case that we cite in answer to the second respondent's submission on the practice of an apex court in an appeal in which there are concurrent findings is *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy & Ors* [1946] AC 508. In that case, the Privy Council held that:

> ... in order to obviate the practice, there must be some miscarriage of justice or violation of some principle of law or procedure. That miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happened not in the proper sense of the word judicial procedure at all. That the violation of some principle of law or procedure must be such an erroneous proposition of law that if that proposition be corrected the finding cannot stand; or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the courts could arrive at their finding is such a question of law.

We would observe that the present instance is a case in which both courts below neglected to apply the true principle of law applicable to the fact pattern here thereby occasioning a miscarriage of justice.

[10] The Court of Appeal did not address its mind in its judgment to any of the points discussed earlier in this judgment. With respect, its approach should have been far more analytical of the facts and of the proceedings at first instance. In particular, there is, despite a recitation of the line of defence taken by the first respondent, no reference whatsoever to the consequence of her having studiously refrained from entering the witness box. Applying *Gurbakhsh v Gurdial* AIR 1927 PC 230, it was her bounden duty to have informed the trial court of all the material circumstances that were peculiarly within her knowledge. The Court of Appeal does not appear to have noticed

this aspect of the case at all. With respect, its judgment is, in this respect, equally flawed as that of the trial judge.

[11] With that we turn now to consider the second issue. The question here is the legal consequence of the mutual understanding between the appellant and the first respondent, including the payments made by the former to the latter. It is, as we have earlier said, clear from the totality of the circumstances that the appellant and first respondent were essentially partners in a business venture. Here we find it appropriate to quote from the judgment of Dixon J in *James Birtchnell v The Equity Trustees, Executors and Agency Co Ltd* (1928–30) 42 CLR 384:

> The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. 'Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore v Smith* (1890) 15 App Cas 223 at p 225; (1886) 35 Ch D 436 at p 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only.

[12] As partners the appellant and the first respondent owed each other a duty to act with utmost good faith towards each other. See *Blisset v Daniel* (1853) 68 ER 1022. The mutual understanding that both partners would purchase in their joint names, with financial contributions from each of them the building in which the business of their restaurant was being conducted and hold it in equal shares formed an integral part of the partnership. Acting in breach of her fiduciary duties the first respondent acquired the property and had it registered in her sole name. She then sold it to the second respondent at a higher price and proceeded to deny the appellant's right to a half share in it. Given the circumstances of this case, the first respondent was clearly guilty of equitable fraud in relation to appellant's interest in the property in question.

[13] The authorities make it clear that if a trustee or other fiduciary acquires property in breach of trust or by means of other unconscionable conduct, he or she holds it on a constructive trust for the true beneficiary. Traditionally, courts have declined to provide a definition of a constructive trust. As Edmund Davies LJ said in *Carl Zeiss Stiftung v Herbert Smith & Co* [1969] 2 Ch 276 at p 300:

> English law provides no clear and all-embracing definition of a constructive trust. Its boundaries have been left perhaps deliberately vague, so as not to restrict the court by technicalities in deciding what the justice of a particular case may demand. But it appears that in this country unjust enrichment or other personal

advantage is not a sine qua non. Thus in *Nelson v Larholt* [1948] 1 KB 339, it was not suggested that the defendant was himself one penny better off by changing an executor's cheques; yet, as he ought to have known of the executor's want of authority to draw them, he was held liable to refund the estate, both on the basis that he was a constructive trustee for the beneficiaries and on a claim for money had and received to their use. Nevertheless, the concept of unjust enrichment has its value as providing one example among many of what, for lack of a better phrase, I would call 'want of probity', a feature which recurs through and seems to connect all those cases drawn to the court's attention where a constructive trust has been held to exist.

[14] In *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400, Millett LJ (later Lord Millett) explained the concept of a constructive trust in terms that is difficult to improve:

A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case (and this is the class with which we are presently concerned), however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well known examples of such a constructive trust are *McCormick v Grogan* (1869) 4 App Cas 82 (a case of a secret trust) and *Rochefoucald v Boustead* [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). *Pallant v Morgan* [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property.

[15] In our considered judgment, the fact pattern of the appellant's case presents no difficulty. It falls squarely within the parameters of a constructive trust. The first respondent did not receive the property in question in her own right. She acquired it pursuant to the mutual arrangement between her and the appellant and with the aid of monies provided by the latter. The cumulative circumstances, in particular the nature of the pre-existing fiduciary relationship and the arrangement to jointly own the property in equal shares, show an intention to create a trust from the outset which the appellant does not impugn. Additionally, there is a strong element of unjust enrichment or lack of probity on the part of the first respondent. The appellant's claim against the first respondent is as a beneficiary under a

constructive trust. It is therefore a proprietary claim and not merely monetary, that is to say, for money had and received.

[16] The trial judge largely influenced by the fact that the appellant had contributed towards the purchase of the property classified the equitable obligation here as a resulting trust. In this he fell into error because he completely overlooked the pre-existing fiduciary relationship between the parties and the mutual understanding they had to acquire the property in their joint names in equal shares. It is perhaps appropriate here to consider the two concepts, namely the resulting trust and the constructive trust. The device of a resulting trust was invented by the Court of Chancery to give effect to the implied intention of parties in relation to the acquisition and disposal of moveable or immovable property. See *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, where Lord Browne-Wilkinson said:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where *A* makes a voluntary payment to *B* or pays (wholly or in part) for the purchase of property which is vested either in *B* alone or in the joint names of *A* and *B*, there is a presumption that A did not intend to make a gift to *B*: the money or property is held on trust for *A* (if he is the sole provider of the money) or in the case of a joint purchase by *A* and *B* in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of *A*'s intention to make an outright transfer: see Underhill and Hayton, *Law of Trusts and Trustees* at pp 317 et seq; *Vandervell v Inland Revenue Commissioners* [1967] 2 AC 291 at pp 312 et seq; *In re Vandervell's Trusts (No 2)* [1974] Ch 269 at pp 288 et seq. (B) Where *A* transfers property to *B* on express trusts, but the trusts declared do not exhaust the whole beneficial interest: ibid and *Quistclose Investments Ltd v Rolls Razor Ltd (In Liquidation)* [1970] AC 567. Both types of resulting trust are traditionally regarded as examples of trusts giving effect to the common intention of the parties. A resulting trust is not imposed by law against the intentions of the trustee (as is a constructive trust) but gives effect to his presumed intention.

[17] When *A* purchases Blackacre in *B*'s name, providing, let us say, the whole of the purchase price, equity presumes that the common intention of the parties is for *B* to hold Blackacre on a trust that results to *A*. This is referred to as a presumed resulting trust. That a trust should result to *A* is fair and just because *A* provided all the money and *B* provided nothing. But if *A* is *B*'s husband, parent or guardian or otherwise stands in loco parentis to *B*, then equity presumes that the common intention of the parties is to make a gift of Blackacre to *B*. This is referred to as the presumption of advancement. However, as the Court of Appeal pointed out in *Heng Gek Kiau v Goh Koon Suan* [2007] 6 CLJ 626 the correct approach to cases where a gift is asserted is:

> ... for a court first to determine the true intention of the purchaser. The question whether the purchaser in a particular case had a donative intention is to be determined objectively through a meticulous examination of the facts and evidence of the surrounding circumstances. If after such an examination the court concludes that there was a donative intention on the part of the purchaser that is the end of the matter and there is no room for the operation of the presumption of resulting trust or advancement as the case may be. It is only where there are no or insufficient facts or evidence from which a fair inference of intention may be drawn that a court should turn to presumptions as a last resort to resolve the dispute.

In arriving at this conclusion the Court of Appeal in that case applied with approval the following passage in the judgment of Gabriel Moss QC (sitting as a Deputy High Court judge) in *Kyriakides v Pippas* [2004] EWHC 646 (Ch) which we also regard as being good law:

> Where there is no declaration (of intention), the court puts itself in the position of a jury and considers all the circumstances of the case, so as to arrive at the purchaser's real intention: *Snell* paras 9–15. It is only where there is no evidence to contradict the presumption that it will prevail: ibid. The case law has developed in such a way that even 'comparatively slight evidence' will rebut the presumption and a 'less rigid approach should also be adopted to the admissibility of evidence to rebut the presumption of advancement': *Lavelle v Lavelle* [2004] EWCA Civ 223 (CA) per Lord Phillips MR at para 17.
>
> I suspect the position we have now reached is that the courts will always strive to work out the real intention of the purchaser and will only give effect to the presumptions of resulting trust and advancement where the intention cannot be fathomed and a 'long-stop' or 'default' solution is needed.

[18] In our judgment, the primary function of the court in a case where a resulting trust is asserted or a gift is alleged arising from a disposition of property is clear. It is to determine whether the initial disponor intended to make a gift of the property be it movable or immovable, or whether he or she intended it to be held by the disponee in trust for some other person or persons, including the disponor or the disponee or both. A court when called upon to decide whether a resulting trust or a gift was intended in given circumstances should not begin by resorting to presumptions. It must meticulously examine the facts to objectively ascertain the true intention of the parties. If the intention of the parties when objectively determined was that the particular property was to be held on a resulting trust then that is the conclusion the court should declare. However, if the intention was that the disponee of the property was to have it as a gift, there can then be no question of a resulting trust being implied. It is only when there is absent any indication of what was intended by the parties that the court should resort to presumptions. Were it otherwise, the court may be arriving at an incorrect conclusion based on a presumption when the evidence points in quite the

A opposite direction. As Devlin LJ (later Lord Devlin) said in *Berry v British Transport Commission* [1961] 3 All ER 65 at p 75:

> ... presumptions of law ought to be used only where their use is strictly necessary for the ends of justice. They are inherently undesirable ... because they prevent the court from ascertaining the truth, which should be the prime object of a judicial investigation, and because, if they are allowed to multiply to excess, the law will become divorced from reality and will live among fantasies of its own.

B

[19] A constructive trust is imposed by law irrespective of the intention of C the parties. And it is imposed only in certain circumstances. Two examples readily available (apart from the facts of this case and those illustrations provided by Millet LJ in *Paragon Finance plc v DB Thakerar & Co*) are (a) where there is a specifically enforceable contract for the sale of property (moveable of immovable), the vendor holds the property on a constructive D trust for the purchaser: see *Wong Siew Choong Sdn Bhd v Anvest Corporation Sdn Bhd* [2002] 3 MLJ 143; [2002] 3 CLJ 409; and (b) where a gift made as a donatio mortis causa fails, the intended beneficiary of the gift holds it in trust for the donor. As may be seen, the vendor in the first illustration and the purportedly dying donor or the beneficiary in the second did not create any E trust. Nor did they intend to do so. What equity does in those circumstances is to fasten upon the conscience of the holder of the property a trust in favour of another in respect of the whole or a part thereof.

[20] As earlier observed, we are of the view that the appellant at all material F times was entitled to a half share in the trust property as a beneficiary under a constructive trust. She was entitled to claim it from the first respondent and to trace her half share in the property into the hands of anyone who acquired it. But equity will not assist the victim of a breach of trust to trace trust property where it will be inequitable to do so, for example because the G property to be traced has gone into the hands of a bona fide acquirer for value or because it has gone into the general funds of a charity (see *Re Diplock's Estate* [1948] 2 All ER 429).

[21] That brings us to the third issue. And that is whether the trust in the H appellant's favour may be enforced against the second respondent. We are of the view that it may. There are two reasons. In the first place, as the trial judge correctly held, the second respondent was not a bona fide purchaser for value. He found that the second respondent company was in substance the alter ego of the first respondent's common law husband with whom she undoubtedly I cohabited. He held, and held correctly, that the knowledge of the first respondent was to be attributed to the husband and thence to the second respondent company. In our judgment, the approach adopted by the trial judge is correct both on principle and authority. As for principle, the starting point is no doubt the doctrine of corporate personality. The general rule is

that a company has an existence that is separate and distinct from its shareholders. It finds expression in the seminal case on the subject, *Salomon v A Salomon & Co Ltd* [1897] AC 22. Lord Halsbury LC there stated the rule thus:

> ... once the company is legally incorporated it must be treated like any other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are.

The Lord Chancellor however provided for cases in which the veil of incorporation may be lifted. He said:

> If there was no fraud and no agency, and if the company was a real one and not a fiction or a myth, every one of the grounds upon which it is sought to support the judgment is disposed of.

The proposition when inverted states that if there is fraud or an agency relationship or if the company is a myth or fiction, the doctrine of corporate personality does not insulate the shareholders or directors from being assailed directly.

[22] A more recent statement of the doctrine of corporate personality is to be found in the case of *Woolfson v Strathclyde Regional Council* 1978 SLT 159 which is authority for the proposition that a litigant who seeks the court's intervention to pierce the corporate veil must establish special circumstances showing that the company in question is a mere facade concealing the true facts.

[23] The 'fraud' of which Lord Halsbury spoke in *Salomon v A Salomon & Co Ltd* includes equitable fraud. In the recent Australian case of *The Bell Group Ltd (In liquidation) v Westpac Banking Corporation (No 9)* [2008] WASC 239; 70 ACSR 1, Owen J discussed the distinction between equitable fraud and fraud at common law. His Honour said:

> 4849 One of the leading Australian texts on equitable principles is R Meagher, D Heydon and M Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (4th Ed, 2002). When I refer to this text from time to time in these reasons I will do so by the shortened phrase '*Meagher, Gummow and Lehane*'. At [12-050] the authors set out a non-exhaustive list of factual and legal situations that have traditionally been treated as species of equitable fraud. They include:
>
> (a) misrepresentation by persons under an obligation to exercise skill and discharge reliance and trust (for example in fiduciary

relationships), and inducements to contract or otherwise for the representee to act to his detriment in reliance on the representation;

(b) the use of power to procure a bargain or gift, resulting in disadvantage to the other party;

(c) conflict of interest against a duty arising from a fiduciary relationship; and

(d) agreements which are bona fide between the parties but in fraud of third persons.

4850 All of these categories can be seen, to varying degrees, in the claims brought by the plaintiffs in the equitable fraud causes of action. The last category is of particular interest because it encompasses the imposition and deceit species referred to as the Earl of Chesterfield fourth limb. I will come to that doctrine shortly.

22.2.1.2. Equitable fraud and common law fraud compared

4851 The term common law fraud is often used to describe the tort of deceit, or the making of fraudulent misrepresentations. The tort of deceit is said to encompass cases where the defendant knowingly or recklessly makes a false statement, with the intention that another will rely on it to his or her detriment.

4852 *Derry v Peek* [1889] UKHL 1; (1889) 14 App Cas 337 illustrates the principle that honesty is a duty of universal obligation, existing independently of contract or fiduciary obligations. In *Derry v Peek*, the House of Lords rejected the argument that a claim of negligence would support an action for fraudulent misrepresentation. In so doing, Their Lordships set the standard for common law fraud. Lord Herschell said, at p 374, that to succeed, a plaintiff must prove 'that a false representation has been made (1) knowingly, or (2) without belief in its truth or (3) recklessly, careless whether it be true or false'. In other words, there must be a lack of an honest belief in the truth of the representation. In *Armitage v Nurse* [1997] EWCA Civ 1279; [1998] Ch 241; [1997] 3 WLR 1046, Millett LJ discussed the meaning of 'actual fraud' in the context of an exemption clause. At p 1053, His Lordship described actual fraud as connoting, at least, 'an intention on the part of the trustee to pursue a particular course of action, either knowing that it is contrary to the interests of the beneficiaries or being recklessly indifferent whether it is contrary to their interests or not'.

4853 This, then, marks out a significant difference between common law fraud and equitable fraud. The latter does not require proof of an actual intention to deceive.

To summarise, a plea of fraud at common law will not succeed absent proof of an intention to deceive. Such an intention is not an ingredient of equitable fraud which is, essentially speaking, unconscionable conduct in circumstances where there exists or is implied or imposed a relationship of trust or confidence.

[24] In *Frame v Smith* (1987) 42 DLR (4th) 81, Wilson J usefully identified some of the principal features of such a relationship. Her Ladyship said:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1) The fiduciary has scope for the exercise of some discretion or power.
>
> (2) The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3) The beneficiary is peculiarly vulnerable to, or at the mercy of, the fiduciary holding the discretion or power.
>
> Very little need be said about the first characteristic except this, that unless such a discretion or power is present there is no need for a superadded obligation to restrict the damaging use of the discretion or power: see for example, *RH Deacon & Co Ltd v Varga, DuDomaine; Third Party* (1972) 30 DLR (3d) 653; affirmed 41 DLR (3d) 767.
>
> With respect to the second characteristic it is, of course, the fact that the power or discretion may be used to affect the beneficiary in a damaging way that makes the imposition of a fiduciary duty necessary. Indeed, fiduciary duties are frequently imposed on those who are capable of affecting not only the legal interests of the beneficiary but also the beneficiary's vital non-legal or 'practical' interests. For example, it is generally conceded that a director is in a fiduciary relationship to the corporation. But the corporation's interest which is protected by the fiduciary duty is not confined to an interest in the property of the corporation but extends to non-legal, practical interests in the financial wellbeing of the corporation and perhaps to even more intangible practical interests such as the corporation's public image and reputation. Another example is found in cases of undue influence where a fiduciary uses a power over the beneficiary to obtain money at the expense of the beneficiary. The beneficiary's interest in such a case is a pecuniary interest. Finally, in *Reading v AG* [1951] AC 507 (HL), a British soldier who was unable (sic) to smuggle items past Egyptian guards because these guards excused uniformed soldiers from their inspections was held to be a fiduciary. The Crown's interest was a 'practical' or even a 'moral' one, namely that its uniform should not be used in corrupt ways. The soldier-fiduciary had no power to change the legal position of the British Crown, so how could the Crown's legal interests have been affected by the soldier's action? The same can be said of the Crown's interest in *AG v Goddard* (1929) 98 LJKB 743, where the Crown was able to recover bribes

> which had been paid to its employee, a sergeant in the metropolitan police. In my view, what was protected in that case was not a 'legal' interest but a vital and substantial 'practical' interest.
>
> The third characteristic of relationships in which a fiduciary duty has been imposed is the element of vulnerability. This vulnerability arises from the inability of the beneficiary (despite his or her best efforts) to prevent the injurious exercise of the power or discretion combined with the grave inadequacy or absence of other legal or practical remedies to redress the wrongful exercise of the discretion or power. Because of the requirement of vulnerability of the beneficiary at the hands of the fiduciary, fiduciary obligations are seldom present in dealings of experienced businessmen of similar bargaining strength acting at arm's length: see for example, *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639; affirmed 40 DLR (3d) 303. The law takes the position that such individuals are perfectly capable of agreeing as to the scope of the discretion or power to be exercised, ie, any 'vulnerability' could have been prevented through the more prudent exercise of their bargaining power and the remedies for the wrongful exercise or abuse of that discretion or power, namely damages, are adequate in such a case.

[25] An instance of equitable fraud analogous to the present case is *Jones v Lipman* [1962] 1 All ER 442. In that case, the first defendant after agreeing to sell his property to the plaintiffs for £5,250 sold and transferred it to a company of which he and his solicitors' clerk were shareholders and directors for £3,000. The plaintiffs sued for and obtained a decree of specific performance against the company of which Russell J (later Lord Russel of Killowen) said:

> The defendant company is the creature of the defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity — an equitable remedy is rightly to be granted directly against the creature in such circumstances.

In *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor* [1996] 3 MLJ 533; [1997] 1 CLJ 529, Chong Siew Fai CJ (Sabah and Sarawak) said that in:

> cases where there are signs of separate personalities of companies being used to enable persons to evade their contractual obligations or duties, the court would disregard the notional separateness of the companies.

His Lordship was there, of course, referring to the legal basis upon which judicial intervention has occurred in cases such as *Jones v Lipman*. And there you have the authority to support the trial judge's approach.

So here. The first respondent sold and transferred trust property to the second respondent which was a device and a sham, a mask which the first respondent's husband held before his face in an attempt to avoid recognition by the eye of equity. Accordingly, this is a case in which there are special circumstances showing that the second respondent company is a mere facade

concealing the true facts. The trial judge was therefore correct in holding the second respondent accountable to the appellant for the trust property. A

[26] The second reason is to be found in statute. But before we proceed further, it is convenient at this stage to examine the reason advanced by the Court of Appeal for the appellant's inability to enforce her rights against the second respondent. Here is the relevant passage: B

> The appellant's claim is only against the first respondent and not against Glamour Land or even Malayan Banking. Both these latter respondents are strangers to the agreement between the appellant and the first respondent as regards the property. C The appellant's two main complaints are that in breach of the agreement between her and the first respondent, the latter had unlawfully registered the property in her sole name. The first respondent had also concealed that fact. And this want of registration of the appellant's name as a co-owner happened despite the request by the first respondent from the appellant for contributions towards the solicitors' fees, compensation payment to the vendor, quit rent, assessment and stamp duty D involved in the purchase of the property, which the appellant promptly had contributed to. The above payments were in addition to the appellant's contribution towards the purchase price. The first respondent had represented in writing to the appellant that the property would be 'for our food business' (RR 457–458). E
>
> The registration issue apart, the appellant's next serious contention was that, sometime in mid-1996 the first respondent with mala fide intent, purportedly sold the property to Glamour Land for the sum of RM1,930,000 in an attempt to defeat her interest. The appellant had alleged that Glamour Land was not a bona fide purchaser and had colluded with the first respondent. It was further alleged F that the owner of Glamour Land in fact was the husband of the first respondent. Glamour Land was averred to have attempted to create a legal charge on the said property in favour of Malayan Banking in order to defeat the appellant's interest.

[27] The Court of Appeal in the foregoing passage appears to argue that the second respondent is not liable to the appellant because it was not privy to the agreement between the former and the first respondent. This completely overlooks and indeed gives the go-by to the trial judge's specific finding that the second respondent was not a bona fide purchaser of the trust property. It also overlooks s 26(b) of the Specific Relief Act 1950 which provides: G H

> Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against —
>
> (a) either party thereto; I
>
> (b) any other person claiming under a party to the contract by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.

[28] The simple answer to the problem contemplated by the Court of Appeal is that the finding by the trial judge that the second respondent had not acquired the trust property in good faith takes the case out of the saving clause in s 26(b). It follows that the agreement between the appellant and the first respondent was, even as a contract, enforceable against the second respondent company.

[29] There is a further answer. Once it is recognised, as it was by the trial judge and as it ought to have been by the Court of Appeal, that the obligation sought to be enforced was a trust, it would have become apparent that the doctrine of privity of contract had nothing to with the fact pattern here. For it is settled law that trusts are an exception to the common law rule of privity of contract. See *Beswick v Beswick* [1968] AC 58.

[30] Based on the facts as found by the trial judge on the issue under discussion, it is crystal clear that the conscience of the second respondent was tainted with knowledge of the trust. Accordingly, the appellant is clearly entitled to enforce the trust against both the first and second respondents.

[31] All that remains to be decided is whether s 433B of the Code stands in the way of enforcement of the trust established in the appellant's favour. This is the fourth issue. In a gist, the section requires a foreigner — and the appellant is a foreigner — to obtain, by way of an application in writing, the prior approval of the relevant state authority to 'acquire land by way of a disposal under Division II'. It also permits, in sub-s (1)(c), upon like condition, the transfer or transmission to, or the vesting in, or the creation in favour of any person or body as 'trustee', or of two or more persons or bodies as 'trustees', where the trustee or one of the trustees, or where the beneficiary or one of the beneficiaries, is a non-citizen. It was the view of the courts below that the facts of the appellant's case came within the section. As for the trial judge, he held that the trust in the appellant's favour did not come into existence until the first respondent had paid the vendor of the property in question the purchase price in full. As for the Court of Appeal, it appears to have taken the view that the resulting trust in the appellant's favour was 'created' when the 'moneys were funnelled to the first respondent. The appellant had entrusted her contribution with the first respondent expecting her share and contribution to be used for her benefit in the joint venture. The fact that she was in Japan away from the hub of the business, let alone the fact that the first respondent persuaded her to part with her money, showed that the first respondent was expected to register her as the co-owner of the property in the business venture. The appellant still retained her proprietary rights, whether expressly or by implication, never intending that her beneficial interest be taken away from her and that the interest in the contribution to eventually revert to her on demand'. The other finding made

by the Court of Appeal is in the following terms: 'The appellant failed to obtain the prior written approval of the state authority as required under s 433B(1) read together with s 433C of the National Land Code ('NLC'). The appellant was beneficially entitled under the resulting trust over the property acquired by the first respondent but no evidence was adduced that the dealing was prior to 1 January 1993.'

[32] With respect, the findings of the trial judge and those of the Court of Appeal suffer from serious errors of principle. Both courts below assumed quite incorrectly that this was a case of a resulting trust. As earlier explained, a resulting trust is one that equity seeks to imply as representing the presumed common intention of the parties in given circumstances. The equitable obligation in the present case ought to have been classified as a constructive trust. At the risk of repetition, and for the reasons earlier provided, a constructive trust is not 'created' by individuals. It arises by operation of law.

[33] In our judgment, what s 433B(1)(c) refers to when it says 'created in favour of any person or body as 'trustee" is an express trust registered in accordance with s 344 of the Code. It does not include within its purview constructive trusts which arise by operation of law. Had Parliament intended that result, it would have said so in clear terms. In any event, there is a guide to statutory construction that presumes that Parliament knows the existing law. It knew, when it enacted s 433B, that a constructive trust is not created by the act of parties; that its is imposed by law, in given circumstances. Accordingly it is our considered view that s 433B has no application to the constructive trust imposed upon the first respondent. It follows that the courts below erred in the way in which they interpreted the section — without regard to the true nature of the trust that they were dealing with. It also follows that it is irrelevant for present purposes whether the section is prospective or retrospective; whether it came into effect before or after the events occurred in this case that led to the imposition of a constructive trust in the appellant's favour. As for s 433B(1)(a), this too does not apply because the appellant did not at any time — to quote the words of the section — 'acquire land by way of a disposal under Division II' of the Code. What did happen was that as early as 1992, the parties had agreed to acquire the property in question in equal shares. But that never happened. Instead, the first respondent, in breach of her fiduciary duties had the property registered solely in her own name. In other words, the first respondent did 'acquire land by way of a disposal under Division II' of the Code. But s 433B does not apply to her as she is not a foreigner. It was merely a consequence of the first respondent's unlawful acts that a constructive trust was imposed upon her in respect of a one half share in the property. And that is something to which s 433B does not apply. We would *ex abundanti cautela* add that this is not a case in which the appellant deliberately sought to evade complying with the

section by having the property registered in the first respondent's name. She was guilty of no such equitable misconduct. Had she been, the result may well have been different. See for example, *Suntoso Jacob v Kong Miao Ming* [1986] 2 MLJ 170 where a resulting trust was defeated on grounds of public policy. This is a case where the appellant as a victim of equitable fraud committed upon her by the first respondent is regarded by equity as a beneficiary under a constructive trust. As we have already said, s 433B does not apply to constructive trusts.

[34] For the reasons already given, we would allow this appeal and set aside the orders of the courts below. We hereby direct the registrar of this court to fix a date on which we may hear counsel on the terms of the relief that ought to be granted and the appropriate order as to costs, that is to say, whether costs should be awarded on a party-party basis or on a common fund basis or on an indemnity basis. The deposit in court shall be refunded to the appellant.

Appeal allowed.

Reported by Kohila Nesan